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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 109

SALVATORE VIRZERA, PETITIONER

v.

UNITED STATES OF AMERICA

No. 110

ORESTE VIRZERA

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The appeals in these cases were heard together and were disposed of in one opinion in the circuit court of appeals (No. 109, R. 74–77; No. 110, R. 73–76), which has not yet been reported.

JURISDICTION

The judgments of the circuit court of appeals were entered May 23, 1945 (No. 109, R. 77; No. 110, R. 76). The petitions for writs of certiorari were filed June 5, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether the evidence adduced at petitioners' trials on charges of knowingly making false statements to their local draft boards is sufficient to sustain their convictions.

STATUTE INVOLVED

Section 11 of the Selective Training and Service Act of 1940 (54 Stat. 885, 50 U. S. C. App. 311) provides:

> * * * any person who shall knowingly make, or be a party to the making of, any false statement or certificate as to the fitness or unfitness or liability or non-liability of himself or any other person for service under the provisions of this Act * * * shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment. * * *.

STATEMENT

On December 16, 1943, indictments were returned in the United States District Court for the Eastern District of New York against petitioner Salvatore Virzera in two counts and against petitioner Oreste Virzera in three counts, charging violations of Section 11 of the Selective Training and Service Act. Count 1 (No. 109, R. 3–4) of the indictment against Salvatore Virzera charged that on or about March 18, 1941, he falsely stated in the questionnaire which he submitted to his local board that he was not a citizen of the United States and that he was a citizen or subject of Italy, well knowing that the statements were untrue; count 2 (No. 109, R. 4) charged a similar knowing false representation on or about November 18, 1943, in an "Alien's Personal History and Statement" submitted by him to his local board. Counts 1 and 3[1] (No. 110, R. 3–5) of the indictment against Oreste Virzera charged like violations. At their separate jury trials petitioners were each convicted on both counts (No. 109, R. 68; No. 110, R. 66) and were sentenced to imprisonment for three years on each count, the sentences to run concurrently (No. 109, R. 70; No. 110, R. 68–69). Upon appeals which were consolidated and disposed of in a single opinion, the judgments were affirmed by

[1] Count 2 was dismissed on motion of the Government (No. 110, R. 6).

the Circuit Court of Appeals for the Second Circuit (No. 109, R. 74–77; No. 110, R. 73–76).

At petitioners' trials, it was undisputed that they are citizens of the United States by virtue of the naturalization of their father and that they misrepresented to their draft board that they were citizens of Italy, not of this country. Their sole defense was that they did not knowingly falsify their citizenship status, that they honestly believed that their father had acquired citizenship by fraud and that they therefore were not lawful citizens of the United States. The pertinent facts relating to this issue, which were substantially the same in both cases, may be summarized as follows:

It was stipulated between the parties, *inter alia,* that early in their childhood, petitioners' father, who had previously migrated to the United States, brought them to the United States from Italy; that some ten years later, on February 7, 1924, a certificate of naturalization was issued to the father; that petitioner Salvatore Virzera, claiming citizenship on the basis of the naturalization of his father, voted in New York elections in 1932, 1933, 1934, 1936, 1937, and 1938; and that petitioner Oreste Virzera similarly voted in the elections of 1934, 1936, 1937, and 1938 (No. 109, R. 5–10; No. 110, R. 6–12).

In an interview on August 20, 1943, with their local board, petitioners denied that their father, who was then deceased (No. 110, R. 19), had ever been naturalized or that he had been a citizen of

the United States (No. 109, R. 15, 16, 22; No. 110, R. 22). Salvatore told the board that "he would rather go to jail than serve in the United States Army" (No. 109, R. 25; see also No. 110, R. 51). Subsequently, in an interview with an F. B. I. agent, Salvatore denied that he had voted in any elections and that his father had been a citizen or had been naturalized, but upon being presented with his voting record, he admitted having voted and that his father had been naturalized (No. 109, R. 40–41). In a similar interview Oreste denied that he was a citizen, or that he had any knowledge of the naturalization of his father, or that he had ever voted, and then declined to answer further questions (No. 110, R. 24–25).

In their defense, petitioners testified that after 1938 they undertook to investigate their citizenship status and that among their deceased father's papers they found documents indicating to them that their father had served in the Italian Army for a short period during the five-year period preceding his naturalization; that, relying on information contained in an otherwise unidentified "naturalization pamphlet" (No. 109, R. 47; No. 110, R. 33) and without consulting an attorney or any government agency, they concluded that their father had received his naturalization certificate by fraud and that they therefore were not citizens of this country. Accordingly, they registered with the Government as aliens and subse-

quently represented to their local board that they were not citizens of the United States (No. 109, R. 43–48, 53–58; No. 110, R. 30–36, 39). Both petitioners admitted on the stand that they had falsified the facts in their discussions with an F. B. I. agent (No. 109, R. 58; No. 110, R. 41, 52).

ARGUMENT

Petitioners do not dispute the fact that they are citizens of the United States or that they misrepresented their citizenship status to their local board. Their sole contention (No. 109, Pet. 4–6; No. 110, Pet. 4–6) is that there is no evidence showing that they knew the representations to be false when they made them. We think it plain, as did the court below (No. 109, R. 75), that the Government's evidence amply supports the verdict of the jury in each of the cases.

The only basis for petitioners' argument that they had no criminal intent is their claim that they mistakenly, but honestly, believed that their derivative citizenship was founded on the asserted fraud of their father and that they were not lawful citizens. If the juries had accepted this defense as credible, petitioners would have been entitled to an acquittal, as the trial court instructed the jury in each case (No. 109, R. 66–67; No. 110, R. 63–64). But the verdicts demonstrate that the juries were unwilling to accept petitioners' defense.

The Government's evidence was plainly sufficient to permit the juries to find that the misrepresentations were purposeful. It is clear that petitioners knew of the naturalization of their father, for they voted for a number of years on the basis of their father's naturalization. Yet they both stated to their local board and an F. B. I. agent that their father had never been naturalized, and, in addition, they told the agent that they had never voted. This, coupled with Salvatore's statement to the board that "he would rather go to jail than serve in the United States Army" (*supra,* p. 5), plainly shows that petitioners sought to conceal their true citizenship status in order to evade military service.[2] It was, of course, for the jury in each case to draw the inferences from the evidence. The inferences drawn by the juries have been sustained by the trial judge and the court below. In these circumstances, we submit that there is no occasion for further review by this Court. *United States* v. *Johnson,* 319 U. S. 503, 518; *Delaney* v. *United States,* 263 U. S. 586, 589–590.[3]

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[2] As enemy aliens, petitioners would not have been required to perform military service unless they were found acceptable by the armed forces (Selective Service Regulation 622.43). Salvatore stated in an alien's personal history form, which he submitted to his local board, that he would not fight for the United States (No. 109, R. 57).

[3] Petitioners suggest that even if the evidence was sufficient to support the verdicts under count 1 of each indictment, it

CONCLUSION

The evidence is amply sufficient to sustain the verdicts of the juries. No question of importance is presented and no conflict of decisions is involved. We therefore respectfully submit that the petitions for writs of certiorari should be denied.

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JULY 1945.

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was insufficient in respect of the other counts, because at the time of the misrepresentations described in those counts, petitioners had disclosed the pertinent facts to their local board. We deem it unnecessary to meet this argument, for the general sentences imposed upon petitioners are each supported by the conviction under count 1 of each indictment. *Hirabayashi* v. *United States*, 320 U. S. 81, 85, 105, and cases cited.

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